In The

Supreme Court of the United States

October Term, 1972

ROBERT J. LEHNHAUSEN, Director of Department of Local Government Affairs of the State of Illinois,

Petitioner,

No. 71-685 vs.

LAKE SHORE AUTO PARTS CO., et al.,

Respondent.

EDWARD J. BARRETT, County Clerk of Cook County, Illinois, et al.,

Petitioners,

No. 71-691 vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

On Writs Of Certiorari To The Supreme Court Of Illinois.

PETITION FOR REHEARING
and
MOTIONS TO MODIFY JUDGMENT AND OPINION

Your Petitioner, Lake Shore Auto Parts Co., Respondent in No. 71-685, petitions this Court for a rehearing of this cause, and, in the alternative, moves this Court for the entry of orders modifying the judgment entered on February 22, 1973, and the opinion filed on that date.

I.

Suggestions In Support Of Motion To Modify Judgment

The judgment of this Court is that the judgments heretofore entered by the Illinois Supreme Court be reversed, without remand or further direction to the court below. The judgment of this Court is applicable, presumably, both to *Lehnhausen* v. *Lake Shore Auto Parts Co.* (No. 71-685) and to *Barrett* v. *Shapiro* (No. 71-691).

In the *Lake Shore* case that judgment presents no problem of interpretation inasmuch as the basis of this Court's decision is made clear in its opinion.

Your Petitioner suggests, however, that as respects *Barrett* v. *Shapiro* the judgment of reversal, without more, necessarily raises grave problems of the utmost concern to the People and the Courts of Illinois.

The opinion of this Court does not concern itself with any of the issues raised by the various parties to *Barrett* v. *Shapiro,*—issues which were entirely different from, and seemingly unrelated to, those argued in *Lehnhausen* v. *Lake Shore.*[1] The judgment of the Illinois Supreme Court in *Shapiro,* in relevant part, was to reverse the order of the trial court in that case insofar as the trial court had denied a motion of the defendant

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[1] The central issue argued by the parties to *Lehnhausen* v. *Lake Shore* was the validity, under the 14th Amendment, of the discriminatory taxing scheme created as a result of the adoption of Article IX-A of the Illinois Constitution. The opinion of this Court is devoted exclusively to that question. Petitioner's brief on the merits in the *Shapiro* case (and his Petition for Certiorari as well) sought to raise three entirely different points,—none of which are touched upon in the opinion of this Court. The summary captions of these three points, as taken from that brief, are set out in the Appendix hereto.

State's Attorney to dismiss the complaint as to the plaintiff Shapiro (49 Ill. 2d 137, at pp. 151-2; App. at p. 32[2]).

By now reversing the judgment of the Illinois Supreme Court, without remand, this Court has apparently reinstated that order of the trial court. *National Nut Co. of California* v. *Kelling Nut Co.*, 61 F. Supp. 76, 80 (N.D. Ill. 1945); *Coit* v. *Sistare*, 84 Atl. 119 (Conn. 1912); *Peak* v. *The People*, 71 Ill. 278, 280 (1874); 2 Freeman on Judgments (5th ed. 1925), §1167, p. 2417. Cf. *United States Trust Co.* v. *New Mexico*, 183 U.S. 535, 539-40 (1901).

The sustaining of Shapiro's complaint in the trial court was attributable to the trial judge's acceptance of Shapiro's contention that the word "individuals", as it appeared in Article IX-A of the Illinois Constitution, was intended only "to prohibit the taxation of personal property by valuation exclusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families." (App., at p. 16). Moreover, the trial judge specifically decreed that "said Amending Article IX-A declares its prohibition *exclusively* as to any personal property tax on the personal property owned by individuals *and used for their personal enjoyment and that of their families.*" (App., at p. 17. Emphasis added.)

Thus the judgment of the trial court in *Barrett* v. *Shapiro* embraced the narrowest conceivable interpretation of the word "individuals",—an interpretation which was decisively rejected by the Illinois Supreme Court (49 Ill. 2d 137, at pp. 146-8; App., at pp. 27-28).

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[2] References herein to "App." are to the printed Appendix filed by the Petitioner in *Lehnhausen* v. *Lake Shore Auto Parts Co.*, No. 71-685.

It therefore appears that a necessary consequence of this Court's judgment in *Barrett* v. *Shapiro*, as that judgment now stands, will be to preclude any contention in the state courts of Illinois that the word "individuals" can be interpreted so as to include categories such as the following: natural persons engaged in business as sole proprietors, or as farmers, or in the practice of a profession; natural persons holding personal property for investment purposes; decedents' estates and trusts; and partnerships organized for business, investment or professional purposes wherein one or more of the partners is a natural person.[3]

Petitioner earnestly believes that it was not the intention of this Court to adopt any such narrow definition of the word "individuals",—or, for that matter, to embrace any particular definition of the word inasmuch as the interpretation of the language of a State Constitution has consistently been held to be a matter for determination by the courts of that State.

Furthermore, as the judgment of this Court now stands, its effect, presumably, is to finally terminate *Barrett* v. *Shapiro* and preclude any further proceedings therein in the state courts of Illinois.

It may well be that this Court's judgment of reversal in *Barrett* v. *Shapiro* is attributable to an understandable confusion created by the peculiar circumstance that the State's Attorney of Cook County, the only party to that case who sought review in this Court of the Illinois

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[3] In the course of its opinion below, the Illinois Supreme Court did undertake a partial definition of the word "individuals". (49 Ill. 2d 137, at p. 148; App., at p. 28). While that definition does preclude any contention that the word implies sole ownership by only one person, it leaves unanswered a host of other problems raised by the word.

Supreme Court's decision, was the *successful* party in the Illinois Supreme Court,—indeed, he was the only wholly successful litigant in these consolidated cases. The judgment of the Illinois Supreme Court was a direction to dismiss the complaint as to all the plaintiffs in *Shapiro*, —precisely the relief which the State's Attorney had requested in his trial court pleadings and motion. A necessary result of the judgment of this Court, as it now stands, is that the Petitioner in *Barrett* v. *Shapiro* has succeeded in overturning a decision in his own favor. Why he should want to do this is a matter not readily apparent from the record, nor from his Petition for Certiorari or brief on the merits filed in this Court.

There is nothing in the opinion of this Court which suggests that the Illinois Supreme Court erred in its judgment dismissing the complaint in the *Shapiro* case.(*) On the face of it, therefore, it would seem that the appropriate judgment here would be to affirm,—rather than to reverse. Your Petitioner respectfully points out, however, that a simple affirmance of the judgment below in *Barrett* v. *Shapiro* will introduce an untoward complication into future litigation in the state courts of Illinois, —litigation which appears inevitable as the scope of the word "individuals" is sought to be established on a case-

(*) That judgment was based on several grounds, none of which involved an interpretation of the United States Constitution, and none of which is in any way offensive to the opinion of this Court. The Illinois Supreme Court rejected each of the various arguments advanced by one or another of the *Shapiro* plaintiffs (including the argument that Article IX-A had abolished *all* property taxation in Illinois). If there is any ambiguity in the opinion on this score it is probably attributable to the *Shapiro* complaint. After setting out a hodge podge of mutually incompatible theories, the *Shapiro* plaintiffs requested the court to consider the relief prayed for "to be applicable only to those of these plaintiffs to whom such contentions and relief prayed would not be inimical." (Rec. p. 273)

by-case basis. This complication is attributable to the trial court's finding that the various *Shapiro* plaintiffs were proper representatives of the classes they purported to represent and that the case was a proper class action (App. at p. 16). If that finding is valid it would of course follow that the dismissal of the *Shapiro* complaint is *res judicata* on the merits of the claims asserted as to all class members. Consequently, all sole proprietors and partners would be forever barred from asserting their right to a tax exemption under the Illinois Constitution, —if the order dismissing the complaint were simply to be affirmed by this Court.

While Lake Shore is confident that the class action findings are void for want of due process of law (see Lake Shore's brief on the merits, at pp. 60-65), and hence subject to collateral attack, it also believes that the many problems created by this order should be disposed of in subsequent state court proceedings in the *Shapiro* case itself. That can best be accomplished, Lake Shore suggests, by vacating the judgment of the Illinois Supreme Court in *Barrett* v. *Shapiro* and remanding the case to that court for further proceedings in accordance with the opinion herein.

Furthermore, remand to the Illinois Supreme Court hopefully will permit that court to devise some solution to the very serious problems which now confront all taxing bodies, public officials and taxpayers as a consequence of the creation throughout the state of innumerable escrows or sequestrations of tax funds in the hands of the various County Collectors in the 102 Illinois counties,—now amounting to many millions of dollars. Some of those funds were created pursuant to a statute enacted by the Illinois legislature during the pendency of this suit. (Ill. Rev. Stat., Ch. 120, §676.01, 1972 Supp The

text is reproduced at page 2a of the Appendix hereto). Others were created pursuant to orders entered in the many suits instituted in different counties, either on the initiative of public officials or on that of taxpayers. (For example, as noted at page 4 of Lake Shore's brief on the merits, the trial court in the *Shapiro* case, while that case was pending before this Court, entered orders purporting to sequester taxes paid by certain classes of personal property owners.) The wording of these many orders vary greatly among themselves, and from the wording of the statute. All of these funding orders, and the statute itself, will clearly require judicial interpretation in order to ascertain which taxpayers are entitled to refunds and in what amounts, as well as judicial supervision of the entire refunding process. (The statute, it may be noted, purports to provide for *"automatic* full repayment" but that appears to be a statement of wishful thinking.) If the trial courts in each county undertake their own separate determinations as to the meaning of the word "individuals", and as to which taxpayers are entitled to refunds, it is inevitable that many conflicting interpretations will arise, resulting in much confusion, expense and great delay in the making of refunds until such time as the state Supreme Court is given an opportunity to make a definitive interpretation.

Wherefore, your Petitioner prays that the judgment entered by this Court on February 22, 1973, in *Barrett v. Shapiro,* No. 71-691, be modified,—either by affirming the judgment of the Illinois Supreme Court (which judgment dismissed the complaint as to all plaintiffs in that case),—or, preferably, by vacating the judgment entered below and either remanding the case to the Illinois Supreme Court with directions to proceed in a manner not inconsistent with the opinion herein or else dismissing

the writ of certionari on the ground that it was improvidently granted. Any form of modification will enable the state courts of Illinois to pass upon those issues, including issues of state constitutional interpretation, which were not decided by this Court and which involve no apparent federal question.

The action herein requested by your Petitioner is amply supported by precedent in this Court:

Parks v. *Simpson Timber Co.*, 389 U.S. 909 (1967) (amending a prior judgment, reported at 388 U.S. 459, so as to provide that the lower court's judgment be vacated, rather than reversed, and directing that the case be remanded so as to permit the lower court to pass upon undecided issues);

Union Trust Co. v. *Eastern Airlines*, 350 U.S. 962 (1956) (modifying the prior judgment of reversal, reported at 350 U.S. 907, by adding a remanding order so as to permit the lower court to pass upon undecided issues);

Klapprott v. *United States*, 336 U.S. 942 (1949) (modifying prior judgment, reported at 335 U.S. 601, so as to conform that judgment to the Court's opinion).

See also, 28 U.S.C. §2106.

II.

Argument In Support Of Petition For Rehearing

No one could plausibly question this Court's statement that only "palpably arbitrary" or "invidious" classifications for tax purposes fall within the prohibition of the equal protection clause. Nor does Lake Shore have any inclination to dispute the court's adoption of the rule that "there is a presumption of constitutionality which can be overcome only by the most explicit demonstration

that a classification is a hostile and oppressive discrimination against particular persons and classes."

In this case, however, the legislature of Illinois, which originally drafted Article IX-A and submitted it to the people for ratification, was unable to think of a single reason with which to justify the discrimination established by that Article. Although that legislature prepared an elaborate "Official Argument" in support of the Amendment (Lake Shore's brief on the merits, at p. 1a), and although that Official Argument is filled with denunciation directed against the ad valorem personal property tax, it contains not one word which even remotely suggests a rationale for the discrimination.

Furthermore, the Illinois Supreme Court (which, Lake Shore respectfully suggests, was in a position to be more than "dimly aware" of the facts upon which it based its judgment) expressly found that:

> "It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others." (49 Ill. 2d 137, at p. 151; App., at pp. 31-32).

Yet this Court now strikes down the judgment of the Illinois Supreme Court on the ground, apparently, that somewhere and somehow there might nevertheless be a basis for the legislation "which would lead reasonable men to conclude that there is just ground for the difference here made." (Slip opinion, at pp. 4-5, quoting from *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 283).

In support of its conclusion this Court uncritically accepts a contention conceived of and advanced at the last minute by the State of Illinois,—a contention which has no support in the record and none in fact:

> "Illinois tells us that the individual personal property tax was discriminatory, unfair, almost impossible to administer, and economically unsound. . . . As respects corporations, the State says, the tax is uniformly enforceable." (Slip opinion, at p. 9).

In reality, the personal property tax on the *non-business* property of individuals is rather easily administered in practice, and relatively fair and non-discriminatory. Assessment practices do indeed vary from district to district, but that is a fact which causes no administrative problems and little unfairness inasmuch as all personal property taxes are distributed only to taxing bodies within the district wherein they are collected. Each assessing district may well employ its own "rule of thumb" as to how it will assess non-business personal property belonging to individuals, and each such rule may well be deemed somewhat arbitrary. Yet the important thing is that each rule can be, and almost always is, uniformly applied throughout that particular taxing district.(5)

It is only in the case of personal property used in business that the evils of personal property taxation in Illinois truly manifest themselves and give rise to the "scandalous" situation noted by all commentators (See

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(5) Thus, the fact that one-third of Illinois' citizens (i.e., those residing in Chicago and not engaged in business) pay no personal property taxes at all is not attributable to any administrative difficulties. Nor does it necessarily indicate any unfairness. It merely reflects a political reality which is heeded by the elected taxing officials. The citizens of Chicago prefer that the property tax burden fall upon real estate and business property. In this respect the City of Chicago, and every other Illinois taxing district as well, has traditionally enjoyed a large measure of *de facto* home rule.

Lake Shore's brief on the merits, at p. 44). And here it is perfectly obvious that there is not one whit of difference between the personal property of business corporations and that of unincorporated businesses,—although Article IX-A would tax the former and not the latter.(*)

Lake Shore must respectfully suggest that the Illinois Supreme Court's judgment invalidating the discrimination was not grounded upon any misconception as to the viability of the *Quaker City Cab* case.(†) In truth, it was based upon an undimmed awareness of the realities which exist in Illinois. The discriminatory taxing pattern established by Article IX-A *is* palpably arbitrary and invidious. It is wholly lacking in any rational basis.

III.

Suggestions In Support Of Motion To Modify Opinion

(1.) At page 2 of the slip opinion, this Court, referring to the case of *Lehnhausen* v. *Lake Shore,* states:

> "The Circuit Court held Article IX-A unconstitutional as respects corporations by reason of the Equal Protection Clause of the Fourteenth Amendment."

This statement appears to be in error inasmuch as the Circuit Court did not hold Article IX-A unconstitutional in any respect. Rather, that court adopted Lake Shore's position and held that certain provisions of the *Revenue*

(*) If Article IX-A had simply exempted "non-business" personal property from tax, no constitutional problem would have arisen.

(†) The only reference to that case in the Illinois Supreme Court's opinion is an extended quotation from a *dissenting* opinion of Justice Brandeis (49 Ill. 2d 137, at p. 150). At all stages of this litigation Lake Shore has readily conceded that *Quaker City Cab* was wrongly decided on its facts.

Act of Illinois were unconstitutional insofar as they purported to impose personal property taxes only on property owned by non-individuals. See App., at p. 8.

(2.) Two typographical errors appear in the slip opinion. In the first line of the first full paragraph on page 2 the name of Lake Shore Auto Parts Co. is misspelled as "Lake Shoe". In the first line on page 3 the citation to the Illinois Supreme Court's opinion is erroneously given as 48 Ill. 2d 137, rather than 49 Ill. 2d 137.

Wherefore, your Petitioner prays that the opinion in this case be modified as hereinabove suggested.

Respectfully submitted,

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Certificate

I hereby certify that I am one of the attorneys of record for Lake Shore Auto Parts Co., Respondent in Case No. 71-685; that I prepared the foregoing Petition For Rehearing; that the said Petition is filed in good faith and not for purposes of delay.

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Arnold M. Flamm

APPENDIX

nmary Captions Of Points Argued In Brief On The Merits Filed By The State's Attorney Of Cook County, Petitioner In No. 71-691

I.

ATE COURT SINGULARLY IGNORED, AND FAILED OLLOW AND APPLY THE SUBSTANTIVE RULE OF ESTABLISHED BY THAT COURT, IMPOSED UN-INGLY, AND INDEED, INVOKED SUA SPONTE BY COURT PRIOR TO THIS CASE. PROPER SUPERVI-BY THIS COURT OF THE STATE JUDICIARY DE-OS THAT THE STATE COURT BE SET ARIGHT. (p. 17)

II.

ONSEQUENCE OF THE STATE COURT'S FAILURE PPLY THE ESTABLISHED LAW IN THAT STATE HE DENIAL BY THAT COURT OF CONSIDERA-OF THE NEW (1970) ILLINOIS CONSTITUTION H RESULTS IN A CONCLUSION REACHED BY COURT THAT THE PUBLIC POLICY OF THE E OF ILLINOIS FAILED TO SUSTAIN ARTICLE WHOSE CONSTITUTIONALITY UNDER THE FOUR-TH AMENDMENT WAS ASSAILED. SUCH FAIL-CONSTITUTES ERROR, OF SUCH GROSS MAGNI-, AS TO COMPEL REVERSAL. (p. 24)

III.

PINION OF THE STATE COURT RESULTS IN THE AL TO THESE PETITIONERS OF DUE PROCESS OF AND EQUAL PROTECTION OF THE LAW WITHIN NTENT OF THOSE CLAUSES OF THE FOURTEENTH NDMENT, FOR THE REASON THAT THE PRESENT-TANDING OPINION OF THAT COURT DENIES THESE TIONERS A FAIR TRIAL WITHIN THE DEFINITION ARED BY THIS COURT. (p. 34)

Ill. Rev. Stat., Ch. 120, §676.01:

The county collector of each county shall deposit in a special interest-bearing escrow account an amount equal to all payments of ad valorem personal property taxes extended in 1972 against personal property owned by a natural person, or two or more natural persons as joint tenants or tenants in common, and received by him pending final disposition of *Lake Shore Auto Parts* v. *Korzen*, 49 Ill. 2d 137 (1971). All such payments shall be considered to have been made under protest. Each taxpayer for whom such tax payments are placed in escrow shall be eligible for automatic full repayment from the county collector if such personal property taxes are ultimately held to be invalid, the provisions of Sections 194 and 195 of this Act notwithstanding. No part of the funds deposited in the escrow account may be withdrawn except by the county collector subsequent to final disposition of *Lake Shore Auto Parts* v. *Korzen*.

Added by P.A. 77-2133, § 1, eff. July 27, 1972.

No. 71-691

SEE No. 71-685.